In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 896

ANDREW J. KALERAK, JR., ET AL., PETITIONERS

v.

WALTER J. HICKEL, SECRETARY OF THE INTERIOR, AND THE STATE OF ALASKA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 396 F.2d 746 (Pet. App. A, 1a-6a).

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1968, and a timely petition for rehearing was denied on September 23, 1968. By order of Mr.

Justice Douglas, the time for petitioning for a writ of certiorari was extended until January 3, 1969, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of the Interior properly rejected petitioners' applications for various tracts of land on the ground that the tracts were included in valid and effective selections of public land previously made by the State of Alaska pursuant to the Statehood Act.

STATEMENT

Petitioners are private individuals who made separate applications for homestead and trade and manufacturing sites in Alaska. The Secretary of the Interior ruled that these applications were invalid because the land in question had already been selected by the State of Alaska as part of the public land it was authorized to select under the Alaska Statehood Act, 72 Stat. 339, 48 U.S.C. pp. 9025-9031. The court below unanimously sustained this determination.

Under Section 6(b) of the Statehood Act, Congress authorized Alaska to select approximately one hundred and three million acres of public lands "which are vacant, unappropriated, and unreserved at the time of their selection". The new State was given a period of not less than ninety days following revocation of any order withdrawing lands within which it was to have a "~~perferred~~ preferred right of selection" (Sec-

tion 6(g)). By order of the Interior Department in 1949, the lands which are involved in this suit had been generally withdrawn from appropriation. In 1962, the City of Anchorage, concerned about the continuation of its water supply, requested that the Bureau of Land Management of the Interior Department withdraw these lands for watershed purposes. Since the city was not a proper applicant for withdrawal, the Bureau suggested that the State of Alaska file a blanket selection of these lands, with assurances that the selected lands would be classified as watershed, and the Bureau would then seek cancellation of the 1949 withdrawal order insofar as it related to these lands. Accordingly, in January 1963, the State of Alaska filed its application (A-058566) for selection, pursuant to Section 6(b) of the Statehood Act, 72 Stat. 339, 340, 48 U.S.C. pp. 9026.

In April 1963, by Public Land Order 3022, 28 Fed. Reg. 3661, the Secretary of the Interior revoked the withdrawal of the land and released it for appropriation. In accordance with Section 6(g) of the Statehood Act, the order provided that Alaska be given a 90-day exclusive preference period (until July 8, 1963) to claim the land. During the 90-day period, Alaska did not file a new claim but it filed two amendments to the original application, specifically referring to it, to include additional lands (to which petitioners make no claim). Two further amendments were filed, in similar form, and pursuant to a decision of the Bureau of Land Management a notice describing *all* lands selected by Alaska was published in an Anchorage newspaper for five consecutive weeks in late 1964.

Between May 27, 1965, and June 17, 1965, some

two years after Alaska had filed its selection and amendments, petitioners filed homestead or trade site claims to some of the land embraced in the State's original application. On these facts, the Secretary of the Interior rejected petitioners' applications, holding that Alaska's application—the first application on record, even if defective—segregated the land from any further appropriation. In any event, the Secretary concluded, Alaska's selection was valid and effective because it could, without offending administrative policy or sound equity, be deemed as refiled within the exclusive preference period when the State submitted amendments expressly referring to the original selection. Although the district court viewed the original selection, filed while the lands were still in withdrawal, as void, the court of appeals upheld the Secretary's determination (Pet. App. A, 4a):

> Alaska's four amendments of its original application for selection, made after the withdrawal of the lands had been revoked, amounted to a reapplication for selection of the lands described in the original application, the result being that plaintiffs' claims, subsequently tendered for filing, were properly rejected.

The court reasoned (*ibid*):

> While Alaska's four amendments of the original application did not include the land descriptions set out in the original application, the state intended such amendments as a reassertion of the original land descriptions as well as applications for the selection of additional lands. This is indicated by the facts that: (1) the new lands were brought in by amendment of the original applica-

tion (referring thereto by number), rather than by new applications, (2) the amendments referred to "additional open lands," indicating Alaska's view that it wished to select the lands described in the original application, and add thereto, and (3) the notice published after the four amendments had been filed, and before any of the plaintiffs tendered their claims for filing, named all lands described in the original application as well as the four amendments.

In view of Alaska's intent in this regard, and the lack of prejudice to plaintiffs inasmuch as they had notice of Alaska's claim to all such lands before they tendered their claims, the Secretary did not abuse his discretion in accepting the amendments as a timely reassertion of Alaska's original application.[1]

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[1] We need not decide whether the district court erred in declining to accept the Secretary's alternative ruling that Alaska's original application, even if defective, accomplished a segregation of of [sic] lands which prevented plaintiffs from acquiring rights therein while the segregation remained in effect.

ARGUMENT

No consideration warranting the exercise of this Court's discretionary jurisdiction is present. The decision of the court of appeals is correct. It does not conflict with any decision of this Court or of any other court. And it is of narrow significance because it turns on the peculiar factual context of this case, unlikely to recur.

The Secretary reasonably concluded that the amendments made by Alaska during its preference period

had the effect of a reaffirmation and refiling of the original selection. The selection and amendments were of record in the tract books, and the land described in the original application and amendments was included in the notice published in accordance with Interior regulations (43 C.F.R. 2222.9-5(c)). Not until long after Alaska had unambiguously asserted its claim to these lands did petitioners seek to establish any interest in them. The Secretary of the Interior thus properly determined that, with the filing of the amendments, the land in controversy was validly selected (Pet. App. C, 37a):

> Here the State has at all times shown its intention to acquire the selected lands and it would have served no useful purpose to require it to file a duplicate of the application already on file.
>
> Therefore we conclude that the amendments filed by the State during and after the preference right period were reaffirmations of the State's original selection and, in the circumstances, are to be treated as though the State had refiled its original application at the time of the amendments. [Footnote omitted.]

Petitioners can point to no equitable circumstances of sufficient weight to defeat the preference given to Alaska by Congress and implemented by the Secretary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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